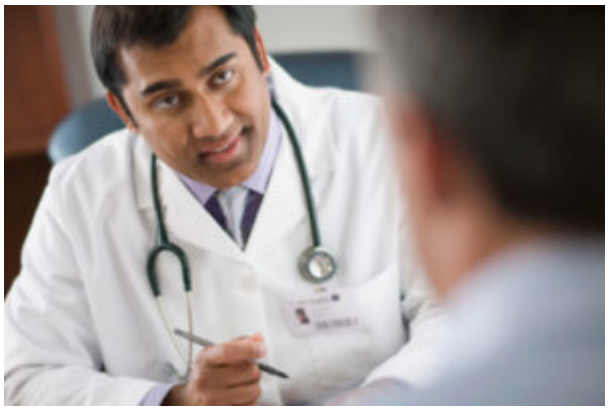
Can Employer Fire Worker for Exaggerating Accommodation Needs?



SITUATION

A worker suffers an injury at work while lifting and carrying heavy samples. The lifting is part of his job and a repetitive task. His doctor diagnoses him with tennis elbow and recommends that he return to work with modified duties, limiting the amount, type and weight of lifting he does. A physiotherapist confirms that the worker has tennis elbow. The worker returns to work on modified duty but co-workers complain about being assigned heavy work he says he can't do. His supervisor also gets reports that he's been seen performing tasks outside the workplace beyond his physical restrictions. The worker tells the supervisor he's taking vacation time to move his family to a new home. He also consults his physiotherapist, who recommends strategies for handling the move given his injury. The employer hires an investigator, who videotapes the worker in public, lifting and carrying items without difficulty (although the weight of the items is unclear). So the employer concludes that the worker exaggerated his need for accommodations due to his injury. When confronted, he initially denies he violated the work limitations but ultimately admits he did lift some items that may have exceeded the weight limits in his restrictions. The worker claims he told his supervisor before leaving on vacation that he was beginning to feel better and could undertake more heavy lifting. He produces a doctor's note retroactively clearing him to return to full work duties, as of the date of his vacation. The worker has a 10-year history with the employer with no prior disciplinary issues.

QUESTION

Can the employer fire the worker'

A. Yes, because he lied about lifting items outside of work.

B. Yes, because his lifting and carrying of items at home could've prolonged his restrictions or further aggravated his injury.

C. No, because it violated his privacy rights by videotaping him outside the workplace.

D. No, because the nature of his dishonesty and otherwise clean record warrant lesser discipline.

ANSWER

D. Although the worker was dishonest about the conduct on videotape, he had an exemplary record over 10 years and so termination was too severe for this misconduct.

EXPLANATION

This hypothetical is based on an Ontario decision in which the arbitrator found that the worker had fraudulently exaggerated his injury but termination was too severe. Videotaped surveillance had shown the worker doing things outside the workplace beyond his restrictions, which he initially denied. The arbitrator noted that engaging in such activities put his recovery at risk and that dishonesty can destroy the employment relationship. However, in this case, the arbitrator explained, the worker didn't fraudulently allege an injury. The worker was truly injured and had evidence to prove the injury and the need for accommodations. Plus, he was improving and could've returned to work without restrictions after his vacation. Additionally, the arbitrator noted that the lifting he did on the surveillance video was intermittent and different than the lifting he would be doing repeatedly in his work. Therefore, because he didn't lie about the injury and had a unblemished 10-year employment record, termination for his dishonesty wasn't warranted, according to the arbitrator, who concluded that the proper discipline for this minor infraction would be no more than a one week suspension.

WHY THE WRONG ANSWERS ARE WRONG

A is wrong because not every lie justifies the most severe discipline'termination. Although it's true that dishonesty goes to the heart of the employment relationship, the circumstances surrounding the lies matter in determining appropriate discipline. In this case, the worker truly had an injury and wasn't fraudulently asserting a need for work accommodations. His dishonesty was in response to the videotape showing him lifting items during a move. But he was permitted even under his work restrictions to do some lifting. A doctor and physiotherapist confirmed his injury and the need for work accommodations. And the worker eventually admitted that he may have lifted items at home that exceeded the workplace weight restrictions. So although he was dishonest, his lie doesn't amount to fraud and wasn't serious enough to destroy a good employment relationship and justify termination.

***Insider* Says**: For more information about appropriate discipline, go to the Discipline and Reprisals Compliance Centre.

B is wrong because although the worker could potentially have prolonged his restrictions or further injured himself by moving items while on modified work duties, this conduct doesn't necessarily warrant termination. Workers have a duty to cooperate in the return-to-work process, including by following any restrictions placed on them. And ignoring these restrictions could justify discipline. Here, the worker conceded that some of the items he lifted exceeded the limits in his work restrictions. But he didn't aggravate his injury by doing so. In addition, he produced evidence that his condition had improved and so the

weight restrictions may not have been necessary at that time. Given all of the circumstances, termination was an unjustifiably severe consequence for exceeding his work restrictions.

C is wrong because employers *can* conduct video surveillance of workers'even outside the workplace'under certain circumstances. And they may be able to rely on the resulting videotapes to discipline the workers filmed. (See 'Winners & Losers: Can You Videotape Workers to Prove Lies About Injury'') Here, the videotape was taken of the worker doing activities outside, where anyone could see him. The employer also had reason to be suspicious given co-workers' complaints and reports that the worker was performing tasks outside of work that were beyond his restrictions. So the employer was justified in conducting surveillance of the worker's activities conducted in public and relying on that video footage to discipline him.

SHOW YOUR LAWYER

United Steelworkers, Local 6571 v. Gerdau Ameristeel'Whitby (Spulnick Grievance), [2016] O.L.A.A. No. 135, April 4, 2016